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Ambition and Abdication: Congress, The Presidency, and the Evolution of the Department of Homeland Security

I. Introduction

When President George W. Bush called on Congress to create a new Department of Homeland Security (DHS) in June of 2002,¹ he likened his proposal to the massive reorganization of disparate federal intelligence and military agencies that followed the passage of the National Security Act of 1947 (NSA).² In a televised address to the nation, Bush compared the country's post-September 11 plight to that faced by Harry S. Truman at the conclusion of the Second World War: "Truman recognized that our nation's fragmented defenses had to be reorganized to win the Cold War. He proposed uniting our military forces under a single Department of Defense and creating the National Security Council to bring together defense, intelligence, and diplomacy."³ Now, Bush said, it was time for Congress to enact "similar dramatic reforms to secure our people at home."⁴

It is true that President Truman faced an awesome challenge in the years following World War II. He had learned, from the experiences of the war and its aftermath, that if the United States was to effectively transition into the world power it seemed destined to become, it would have to forge unifying policy directives for its historically autonomous military branches.⁵ The country would also have to overcome its longstanding reluctance to engage in foreign intelligence activity if it were to win the Cold

¹ *Bush Wants Broad 'Homeland Security' Overhaul*, June 7, 2002, at <http://www.cnn.com/2002/ALLPOLITICS/06/06/bush.security>.

² National Security Act of 1947, 50 U.S.C. § 402 (2003).

³ David Greenberg, *The Truman Show*, June 13, 2002, at <http://slate.msn.com/id/2066942/>.

⁴ *Id.*

⁵ See, e.g., Frank N. Trager, *The National Security Act of 1947: Its Thirtieth Anniversary*, 29 AIR U. REV. 2, 5-9 (1977), available at <http://www.airpower.maxwell.af.mil/airchronicles/aureview/1977/nov-dec/trager.html>.

War.⁶ The NSA addressed these needs by structuring a joint command for the Navy, Army, and Air Force in the Department of Defense, and by creating the National Security Council and the Central Intelligence Agency.⁷ In centralizing the command of these departments, the Act also solidified the presidency's vast institutional power over foreign affairs.

The terrorist attacks of September 11, 2001 paved the way for a similar transfer of domestic power to the executive branch. Following the attacks, it soon became clear that the United States' Cold War-era intelligence and domestic security infrastructure needed another overhaul.⁸ But it was not at all clear what particular structure that overhaul should take. From the beginning, Congress and the executive branch had sharply contrasting ideas about how best to shore up national security.⁹ Given the widespread perception that U.S. intelligence had failed in the months leading up to the attacks, both branches agreed that the various agencies responsible for the nation's defense needed to be unified in their missions and objectives.¹⁰ But behind the national security objectives were other concerns. While both Congress and the White House envisioned an agency that would capitalize on effective intelligence gathering and strengthening domestic security, their respective ideas also reflected institutional concerns unique to each branch. Given the fundamental reallocation of authority that would accompany the creation of the agency that would ultimately oversee domestic security, each branch stood to gain – or lose – significant institutional power.

The evolution of the Department of Homeland Security has, in many ways, been a struggle for constitutional power between Congress and the Presidency. Since September 2001, both branches have forwarded plans with provisions that would extend – or at a minimum, shore up – their respective institutional

⁶ See *id.* at 9-10.

⁷ See National Security Act of 1947 §§ 401, 402, 403.

⁸ See Harold C. Relyea, *Homeland Security: The Concept and the Presidential Coordination Office—First Assessment*, 32 PRESIDENTIAL STUD. Q. 397, 397-99 (2002).

⁹ See *id.* at 411. By the end of 2001, several bills had been introduced that would establish some type of statutory homeland security department. *Id.* The bills were introduced by both chambers of Congress and were authored by both Republicans and Democrats. *Id.*

¹⁰ See *id.* at 399.

powers. Each branch has relied on different constitutional methods, with varying degrees of success, to forward its goals. This Comment will examine the effect of those methods that have already been employed, and those that likely will be implemented in the future, and analyze the implications – not only for the American Congress and the presidency, but also for transparent, democratic government in general. This Comment will conclude that, just as the NSA bolstered the institutional power of the presidency over foreign affairs, the Homeland Security Act (HSA)¹¹ has given the executive branch an unprecedented level of control over domestic policy and practice.

II. The Evolution of the Department of Homeland Security

In terms of the struggle for power, Congress was at a disadvantage from the beginning, despite its traditional strength in the realm of domestic affairs.¹² In the wake of the devastating attacks of September 11, the country was clearly rallying behind the President.¹³ Throughout American history, wartime has traditionally been a low point for congressional power, and a high point for the presidency.¹⁴ By virtue of his Commander-in-Chief power, his preeminence in the realm of foreign affairs, and perhaps most importantly, his unique institutional ability to “speak with one voice,” the President is the natural figure for the nation to stand behind in times of war.¹⁵

¹¹ Homeland Security Act of 2002, 6 U.S.C. § 101 (2002).

¹² See generally Kirk Victor, *Congress in Eclipse*, 35 NAT'L J. 1066 (2003).

¹³ See Michael Nelson, *George W. Bush and Congress: The Electoral Connection*, 32 PERSP. ON POL. SCI. 157, 160 (2003). Following the September 11 attacks, President Bush's approval ratings shot up thirty-five percentage points “virtually overnight,” peaking at around ninety percent. *Id.* Bush's ninety percent approval rating was the highest that any president had ever achieved. *Id.*

¹⁴ Victor, *supra* note 12, at 1069. Michael Nelson observes:

Presidents typically receive short-term boosts in public approval as a result of the “rally round-the-flag” effect, which John E. Mueller has defined as “being associated with an event which (1) is international and (2) involves the United States and particularly the president directly; and it must be (3) specific, dramatic, and sharply focused.”

Nelson, *supra* note 13, at 160 (quoting JOHN E. MUELLER, *WAR, PRESIDENTS, AND PUBLIC OPINION* (Wiley 1973)).

¹⁵ See Victor, *supra* note 12, at 1068-69; Nelson, *supra* note 13, at 161.

The Bush Administration was aware of its advantage. By early October 2001, the President had established the Office of Homeland Security (OHS) by Executive Order,¹⁶ and had appointed Pennsylvania Governor Tom Ridge as its director.¹⁷ The purpose of OHS, according to Bush, was "to coordinate the executive branch's efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States."¹⁸

But while Congress had acquiesced to the President on most national security matters since September 11,¹⁹ the Homeland Security issue, which "lay at the intersection of national security policy and domestic policy," was not an easy sell.²⁰ Almost immediately, critical voices arose from the other end of Pennsylvania Avenue. Senators and Representatives from both sides of the aisle worried that the OHS's mission was too broad, that it was too insulated from congressional oversight, and that Ridge had too little authority to carry out his mission effectively.²¹ Because OHS was created within the Executive Office of the President, Bush did not have to seek the advice and consent of the Senate when appointing its officers.²² Furthermore, Bush could fund OHS with discretionary White House funds, bypassing the congressional appropriations process for agencies, and largely insulate Ridge (technically a presidential advisor) from congressional oversight by calling upon executive privilege.²³

¹⁶ Exec. Order No. 13,228, 3 C.F.R. 796 (2001).

¹⁷ See Thomas Cmar, Recent Development, *Office of Homeland Security*, 39 HARV. J. ON LEGIS. 455, 455 (2002).

¹⁸ *Id.*

¹⁹ Post-September 11 congressional acquiescence was perhaps most apparent in the swift passage of the USA PATRIOT Act, which was signed into law in October 2001. See, e.g., Nelson, *supra* note 13, at 160-61.

²⁰ *Id.* at 161.

²¹ See Relyea, *supra* note 8, at 410.

²² See *id.* at 401.

²³ See *id.* In his June 2002 article, Relyea noted:

[B]ecause it has a presidential mandate and its leader is a member of the White House Office staff, OHS may be funded, in large or small part, from discretionary monies available to the president or amounts from the White House Office budget, with the result that congressional overseers and appropriators may have difficulty determining the adequacy of the OHS budget.

Indeed, within the first few months of the Office's existence, the Administration frequently dodged requests from Congress to have Ridge testify regarding his activities as director.²⁴

Both Democratic and Republican members of Congress began calling for the creation of a cabinet-level agency, and for a statutory grant of power to Ridge that would give him more autonomy from the executive branch.²⁵ Creating a cabinet-level department would also presumably give Congress more oversight and influence over the new agency's activities.²⁶ At first, the Bush Administration vehemently opposed the idea.²⁷ But by spring of 2002, pressure from Congress and unfolding revelations concerning the continuing inadequacies of intelligence coordination began to diminish the President's resistance.²⁸ As it became clear that a cabinet-level Department of Homeland Security would be increasingly difficult to avoid, the Administration took the reins and made its proposal to Congress in June of 2002.

During the summer of 2002 and into the fall election season, the Administration and Congress went back and forth over the details of the new agency's structure and mission.²⁹ President Bush attempted to tap the nation's still-waxing patriotism by calling on Congress to pass his version of the Homeland Security Act by September 11, 2002, the one-year anniversary of the attacks on the Pentagon and World Trade Center.³⁰ West Virginia Senator Robert

Id.

²⁴ Press Release, Sen. Joseph Lieberman, Statement by Chairman Lieberman on Establishing a National Department of Homeland Security (Apr. 11, 2002), *available at* <http://lieberman.senate.gov/press/02/04/2002411658.html> [hereinafter Lieberman Statement].

²⁵ See *id.*; see also *Bush Wants Broad 'Homeland Security' Overhaul*, *supra* note 1; Relyea, *supra* note 8, at 410-11.

²⁶ See Relyea, *supra* note 8, at 410-11; Richard E. Cohen et al., *The Ultimate Turf War*, 35 NAT'L J. 16 (2003).

²⁷ See, e.g., *Bush Wants Broad 'Homeland Security' Overhaul*, *supra* note 1.

²⁸ See *id.*

²⁹ See Jonathan Thessin, Recent Development, *Department of Homeland Security*, 40 HARV. J. ON LEGIS. 513 (2003) (detailing the recommendations of the Hart Rudman Commission and the Gilmore Commission); Lieberman Statement, *supra* note 24.

³⁰ See 148 CONG. REC. S8041-S8048 (2002) (statement of Sen. Byrd) [hereinafter Byrd Statement].

Byrd characterized the President's efforts as an attempt to strong-arm Congress:

The President's proposal has been barreling through Congress like a Mack truck, threatening to run over anyone who dares to stand in its way. And Congress, so far, has cleared a path and cheered on this rumbling big rig, without stopping to think seriously about where it is ultimately headed.³¹

Despite these expressions of indignation from Byrd and other senators, the President ultimately prevailed. The Republican-controlled House had passed a version of the bill³² that was very sympathetic to the President's wishes on June 24, 2002, by a vote of 295 to 132.³³ The bill was then received by the Democrat-controlled Senate, which successfully resisted signing it for several months.³⁴ But in early November, the Republicans won back the Senate, albeit by a slim margin, and the Democrats seemed to lose their will to fight. On November 19, 2002, the Senate signed off on a compromised version of the bill, and the President signed it into law on November 25.³⁵

In *The Imperial Presidency*,³⁶ Arthur Schlesinger identified three factors that allowed President Richard Nixon to expand his institutional powers in the context of war: (1) assertions of executive privilege; (2) conducting covert operations; and (3) Congress's abdication of its institutional war making powers.³⁷ While the struggle between Congress and the Presidency in the context of the HSA did not directly concern the War Powers, the spirit of secrecy, presidential autonomy, and congressional abdication implicit in Schlesinger's observations is applicable. Much of the HSA debate surrounded the Administration's efforts to extend its power by controlling and insulating information from congressional – and thus public – scrutiny.³⁸ Similarly, President

³¹ *Id.*

³² H.R. 5005, 107th Cong. (2002).

³³ Thessin, *supra* note 29, at n.2.

³⁴ *Id.*; see also Byrd Statement, *supra* note 30.

³⁵ See Thessin, *supra* note 29, at n.1.

³⁶ ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2d ed., Houghton Mifflin Company 1989) (1973).

³⁷ See *id.*

³⁸ See Victor, *supra* note 12.

Bush pushed for broad authority and “flexibility” in the management of DHS employees. Specifically, the Administration fought for the ability to suspend traditional labor and civil rights protections for federal employees when the President or Secretary of Defense determined that national security required it.³⁹ This “flexibility” extended the President’s autonomous discretion, further insulating the executive branch from public scrutiny. Congressional acquiescence made this historic power shift possible.

Philip Bobbitt has observed that a fundamental ethos of the Constitution is the notion of self-government, which posits that the government’s “limited sovereignty derives from delegation by the people, who are wholly sovereign.”⁴⁰ A corollary, Professor Bobbitt notes, is that the people must be able to “affirm actions taken in their name” through the electoral process.⁴¹ This is only possible, of course, if the people know what the government is doing.⁴² “A democracy cannot . . . tolerate secret policies, because they are robbed of the legitimacy our institutions confer.”⁴³

When the executive branch extends its power by insulating information and policies from public scrutiny, Congress is in the unique position to check that power by insisting on transparency.⁴⁴ In the battles over the shape of the Department of Homeland Security, Congress’s efforts in this realm failed. The Bush Administration won unprecedented levels of control over information, intelligence, and internal management at the new Department because Congress abdicated much of its institutional authority to prevent it.

³⁹ See *infra* Part IV.

⁴⁰ Philip Bobbitt, *War Powers: An Essay on John Hart Ely’s War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1393 (1994).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 1394.

⁴⁴ See Victor, *supra* note 12.

III. The Struggle for Information

A. Congressional Oversight Generally

The Bush Administration's reluctance to share information regarding Homeland Security with Congress was notable from the beginning.⁴⁵ Controlling information in the name of security is one of the key devices Bush has used to shore up the institutional power of the presidency. By insulating executive activity from public and congressional scrutiny, the Administration has gained significant freedom to conduct its policymaking according to its own objectives. This strategy has been successful largely because Congress has chosen to acquiesce in the Administration's demands for secrecy.⁴⁶

Congress has the constitutional power to delegate discretionary, budgetary, and policymaking authority to the executive branch through the creation of administrative agencies.⁴⁷ Congress is not allowed to make such a delegation unless it provides a legislatively enacted "intelligible principle" to guide an agency in the exercise of its discretion.⁴⁸ Once the statutory delegation is made, Congress retains several institutional controls over agency action.⁴⁹ Direct controls include the power to overrule agency decisions through subsequent legislation, statutorily alter an agency's jurisdiction, and utilize appropriations to limit what an agency can do with its funding.⁵⁰ The Senate also exercises considerable influence over agencies through its constitutional

⁴⁵ See *Panel Plans Subpoena for Records Tied to 9/11*, CHI. TRIB., Nov. 8, 2003, at C13; Victor, *supra* note 12. Victor tracks the ongoing parrying between Congress and the Bush Administration over requests for information, including the Justice Department's implementation of the USA PATRIOT Act, Tom Ridge's activities as Director of the OHS, and Vice President Cheney's battles with the GAO. *Id.*

⁴⁶ See Victor, *supra* note 12.

⁴⁷ See *United States v. Grimaud*, 220 U.S. 506 (1911) (rejecting a challenge to the Secretary of Agriculture's authority to impose fines under a broad delegation of power); *Field v. Clark*, 143 U.S. 649 (1892) (congressional grant to the executive branch of power to impose tariffs when president determined they were necessary is constitutional).

⁴⁸ See, e.g., *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

⁴⁹ See RICHARD J. PIERCE, JR. ET AL., *ADMINISTRATIVE LAW AND PROCESS* § 3.1 (3d ed. 1999).

⁵⁰ *Id.*

authority to provide “advice and consent” on executive appointments.⁵¹ Less formally, Congress can influence agencies politically through oversight committees, investigatory hearings, direct contacts with agency officers, and by pressuring the president to appoint officers who fall in line with congressional expectations.⁵²

Congress’s ability to provide oversight to the DHS has been a key factor in that Department’s evolution. From the beginning, Congress has pushed for more transparency, and the administration has repeatedly balked.⁵³ Soon after the formation of the OHS, Congress began issuing requests for information from then-OHS Director Ridge.⁵⁴ In March of 2002, Republican Senator Ted Stevens and Democratic Senator Robert Byrd invited Ridge to testify before the Senate Appropriations Committee.⁵⁵ The President announced that Ridge would not appear.⁵⁶ Since the OHS existed within the Executive Office of the Presidency, the White House informed Stevens and Byrd, Ridge had the status of a presidential advisor rather than a cabinet-level appointee.⁵⁷ It was the Administration’s position that “members of the President’s staff do not ordinarily testify before congressional committees.”⁵⁸

In subsequent communications with the senators, Ridge indicated that he would be willing to offer a compromise that would “avoid the setting of a precedent that could undermine the constitutional separation of powers and the long-standing traditions and practices of both Congress and the executive branch.”⁵⁹ Ridge offered to meet informally with Senate and House members for the purpose of providing a public briefing on OHS activities.⁶⁰ At the briefing, Ridge assured his critics,

⁵¹ U.S. CONST. art. II, § 2.

⁵² See PIERCE, JR. ET AL., *supra* note 49, § 3.1.

⁵³ See, e.g., Byrd Statement, *supra* note 30.

⁵⁴ See Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 398-400 (2002).

⁵⁵ *Id.* at 398.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* (quoting White House liaison Nicholas Calio).

⁵⁹ *Id.* at 399.

⁶⁰ *Id.*

members of Congress would be free to ask him questions.⁶¹ Presumably, the less formal environment of the "briefing" would allow Ridge to maintain control of the agenda. Ridge explained that he was happy to meet with lawmakers in "briefings," but not in "hearings."⁶²

The President was calling upon executive privilege to insulate Ridge's activities and communications from formal congressional review.⁶³ In *United States v. Nixon*,⁶⁴ the U.S. Supreme Court recognized that certain information is subject to the protections of executive privilege.⁶⁵ However, the Court held that those protections are not absolute in all circumstances.⁶⁶ When challenged in the context of a criminal prosecution, for instance, the Court will apply a balancing test to determine whether information is privileged. It will evaluate the importance of disclosure against the President's need to keep the information confidential.⁶⁷ *Nixon* had serious implications for the institutional strength of the presidency. Congress can now, in the context of a criminal prosecution, challenge assertions of presidential privilege, and the President would be obliged to argue his case before a federal court *in camera*.

Beyond criminal prosecutions, Congress has other checks against executive power in its constitutional arsenal. As the Court noted in *Nixon v. Fitzgerald*,⁶⁸ Congress can check the president through control of the budget, oversight, political pressure (via the media, for example), and impeachment.⁶⁹ But in order for these checks against presidential power to have any effect, Congress must be willing and able to use them. In the case of the Bush

⁶¹ *Id.*

⁶² *Id.* at 399-400.

⁶³ See Relyea, *supra* note 8.

⁶⁴ 418 U.S. 683 (1974).

⁶⁵ *Id.* at 705.

⁶⁶ *Id.* at 706. The Court noted that "neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified presidential privilege of immunity from judicial process under all circumstances." *Id.*

⁶⁷ *Id.* at 711.

⁶⁸ 457 U.S. 731 (1982).

⁶⁹ *Id.* at 757.

Administration's assertions of OHS privilege, neither of those prerequisites was satisfied.

As the OHS and DHS have evolved, Congress has repeatedly backed down from any meaningful challenges to the President's attempts to extend power to the executive branch.⁷⁰ Faced with a popular wartime president citing the need for tight domestic security as his motivation, Congress has effectively abdicated much of its institutional oversight authority.⁷¹ The major consequence is that the Administration has largely been able to have its way in structuring the new Department.⁷² As the bill that would eventually become the HSA made its way through Congress, the President exerted considerable influence over its architecture and successfully protected his ability to maintain firm control over information and intelligence.

B. Self-Policing

The debate over the Department's authority to police itself and oversee investigations of complaints of civil rights violations was one area where these maneuvers were played out. Section 705 of the HSA establishes an Officer for Civil Rights and Civil Liberties who has authority to "review and assess information alleging abuses of civil rights, civil liberties, and racial and ethnic profiling by employees and officials of the Department."⁷³ This Officer is appointed by, and reports directly to, the Secretary of Homeland Security.⁷⁴ Because he is directly appointed by the Secretary, this Officer is not subject to Senate approval.⁷⁵ Congress and the public are further insulated from the activities of this Officer by another provision in the Act, which only requires the Secretary to account for the activities of this Officer in his annual report to Congress.⁷⁶

⁷⁰ See Victor, *supra* note 12. Victor quotes Sen. Byrd for the proposition that, in the midst of the War on Terror, Congress is "sleepwalking through history." *Id.*

⁷¹ See *id.*

⁷² See *id.*; Nelson, *supra* note 13.

⁷³ Homeland Security Act, 6 U.S.C. § 705(a)(1) (2002).

⁷⁴ *Id.*

⁷⁵ See *id.*; Byrd Statement, *supra* note 30.

⁷⁶ Homeland Security Act § 705(b). Section 705(b) provides in full:

The Secretary shall submit to the President of the Senate, the Speaker of the House of Representatives, and the appropriate committees and subcommittees

In his statement of September 3, 2002, Senator Byrd said that allowing the Secretary this much control over internal investigations puts the “fox in charge of the hen house.”⁷⁷ The Secretary, Byrd noted, is under no real obligation to actually follow up on civil rights complaints – only to report them to Congress in his annual reports.⁷⁸

The HSA also grants the Secretary broad authority and discretion over the Inspector General.⁷⁹ Specifically, section 811(a) provides that “the Inspector General shall be under the authority, direction, and control of the Secretary with respect to audits or investigations, or the issuance of subpoenas, that require access to sensitive information” related to homeland security.⁸⁰ The Act enumerates a number of specific areas of “sensitive information”⁸¹ that trigger the Secretary’s discretion, but ends by giving the Secretary broad authority over any “other matters the disclosure of which would, in the Secretary’s judgment, constitute a serious threat to national security.”⁸² With respect to this “sensitive information,” the Secretary can prohibit the Inspector General’s investigations if he “determines that such prohibition is necessary to prevent the disclosure of any information described in subsection (a), to preserve the national security, or to prevent a significant impairment to the interests of the United States.”⁸³

In short, the Secretary has complete authority to bring any investigation to a halt, at his discretion. But the Act does allow for some oversight of the Secretary’s discretion by Congress. If the

of Congress on an annual basis a report on the implementation of this section, including the use of funds appropriated to carry out this section, and detailing any allegations of abuses described under subsection (a)(1) and any action taken by the Department in response to such allegations.

Id.

⁷⁷ Byrd Statement, *supra* note 30.

⁷⁸ *Id.*

⁷⁹ See Homeland Security Act § 811.

⁸⁰ *Id.* § 811(a).

⁸¹ For example, the Act identifies as “sensitive” information that concerns: intelligence, counterintelligence, or terrorism; ongoing criminal investigations; undercover operations; and the identity of confidential sources including protected witnesses. *Id.* § 811(a)(1)-(4).

⁸² *Id.* § 811(a)(6).

⁸³ *Id.* § 811(b).

Secretary exercises his authority to prohibit an investigation by the Inspector General, he must notify him in writing and the Inspector General must, in turn, transmit a response and a copy of the notice to the President of the Senate and the Speaker of the House.⁸⁴ The Act does not, however, provide for any specific disclosures from the Secretary in his notification. Thus, the Secretary retains significant discretion over what Congress does or does not know. As Senator Byrd correctly observes, the Civil Rights Officer and the Inspector General are not “given enough authority to actually carry out their jobs.”⁸⁵

In short, the Secretary and the President can largely determine which Department activities may be disclosed to Congress and which are insulated in the name of homeland security. This power gives the executive branch an unprecedented level of information control in the realm of domestic policy and security. One of the prevailing theories of the constitutionality of administrative delegation is founded on transparency.⁸⁶ When agency action is transparent – where the agency’s procedures are open to congressional and public scrutiny – the likelihood of an abuse of power is significantly lessened. In the DHS, many of the checks that ensure transparency have been undermined.

C. *The FOIA Exemption*

A striking example of Congress’s struggle to maintain transparency in the DHS arises from debate over the creation of exemptions to the Freedom of Information Act (FOIA) that eventually made their way into the HSA.⁸⁷ According to Vermont Senator Patrick Leahy, the Republican-authored exemption provision “guts the FOIA at the expense of our national security and public health and safety.”⁸⁸ In its initial proposal to Congress in June 2002, the Administration created a FOIA exemption for any information “voluntarily” provided to the new Department by

⁸⁴ *Id.* § 811(c).

⁸⁵ Byrd Statement, *supra* note 30.

⁸⁶ See PIERCE JR., ET AL., *supra* note 49.

⁸⁷ See Homeland Security Act §§ 211-15; see also Statement of U.S. Senator Patrick Leahy, The Homeland Security Department Act, Nov. 19, 2002, at <http://www.senate.gov/~leahy/press/200211/111902c.html> [hereinafter Leahy Statement].

⁸⁸ Leahy Statement, *supra* note 87.

"non-Federal" entities that pertained to "infrastructure vulnerabilities or other vulnerabilities to terrorism."⁸⁹ Senator Leahy noted that this exemption creates an unprecedented level of cover for private-sector contractors and businesses.⁹⁰ The broad exemption will "encourage government complicity with private firms to keep secret information about critical infrastructure vulnerabilities, reduce the incentive to fix the problems and end up hurting rather than helping our national security."⁹¹

On June 26, 2002, the Senate Judiciary Committee queried Tom Ridge on the exemption.⁹² Then-OHS Director Ridge expressed an eagerness to work with the Democrat-controlled Committee to arrive at a compromise that would be satisfactory to both the Senate and the Executive.⁹³ During the course of the fall, the two branches did work together on the provision, and arrived at a much narrower exemption on July 24.⁹⁴ However, following the Democratic defeat in November, the new majority replaced the compromise clause with the former broad exemption.⁹⁵

Under the final version of the HSA, private companies may designate certain information as "Critical Infrastructure Information" and "voluntarily" submit this information to the Department.⁹⁶ By doing so, the company will obtain an exemption from the normal public disclosure requirements embodied in the FOIA.⁹⁷ If a government employee with access to this information discloses it, she will face criminal prosecution and possible job loss under the HSA.⁹⁸

This exemption alone grants an enormous level of power to the executive branch by shielding its activities, and those of "critical infrastructure" companies, from oversight by Congress and the public. As Senator Leahy observed:

⁸⁹ *See id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*; Homeland Security Act §§ 211-15.

⁹⁶ Homeland Security Act §§ 212, 214.

⁹⁷ *Id.* § 214.

⁹⁸ *Id.* § 214(f).

This provision means that if a Federal regulatory agency needs to issue a regulation to protect the public from threats of harm, it cannot rely on any voluntarily submitted information—bringing the normal regulatory process to a grinding halt. Public health and law enforcement officials need the flexibility to decide how and when to warn or prepare the public in the safest, most effective manner. They should not have to get [a] “sign off” from a Fortune 500 company to do so.⁹⁹

“Critical infrastructure” covers matters such as electrical grids, computer systems, and water treatment facilities.¹⁰⁰ Michigan Senator Carl Levin pointed out that, under the new Act, polluting companies can be immunized from civil liability Environmental Protection Agency (EPA) enforcement.¹⁰¹ For example, if the DHS learns from a chemical company that it is in danger of releasing toxic gas because of an infrastructure vulnerability, the Act “ties the hands” of officials, preventing them from sharing the information with a court or with the EPA.¹⁰²

One of the separation of powers concerns inherent to administrative law is the possibility that an agency with delegated authority will become “captured” by special interests.¹⁰³ The FOIA exemption illustrates the danger. The Administration’s ability to impose tight controls over public access to information that comes across the desks of DHS officials opens the way for abuse by private companies. The concern expressed by Senator Levin is that companies and issues to which the Bush Administration might be sympathetic will get a free pass on the regulatory front as a result of the exemption.¹⁰⁴ But the President also has an interest in allowing the exemption. There is ample precedent in the arena of regulatory law for the proposition that voluntary compliance with overarching policies and rules should be rewarded.¹⁰⁵ By

⁹⁹ Leahy Statement, *supra* note 87.

¹⁰⁰ Rebecca Daugherty, *Homeland Security Act Blocks Unclassified Information from Public, Protects the Companies that Provide it*, NEWS MEDIA & THE LAW, Winter 2003, at 9, available at <http://www.rcfp.org/news/mag/27-1/cov-homelact.html>; see also Homeland Security Act § 212.

¹⁰¹ See Daugherty, *supra* note 100.

¹⁰² *Id.*

¹⁰³ See PIERCE ET AL., *supra* note 49, at 45.

¹⁰⁴ See Daugherty, *supra* note 100.

¹⁰⁵ For example, the Clean Water Act has enforcement provisions that allow self-

protecting critical infrastructure companies that voluntarily report potential security issues, the overarching objectives of the DHS are strengthened. But the question arises: when do such protections go too far and threaten other, more important public policy interests? A strong case can be made that the FOIA exemption is just such an overinclusive provision.

Senators, including Democrats Leahy and Levin, and Utah Republican Robert Bennett, called for more time to debate these and other provisions of the bill.¹⁰⁶ But for various reasons – including pressure from the Administration and the Democrats' loss of a mandate due to their electoral defeat in November – these voices of opposition were unable to prevail.¹⁰⁷ In the end, the Senate signed off on the House bill, which retained many of the Administration's original provisions.¹⁰⁸ Secretary Ridge has since indicated his continued willingness to work with the Congress on these and other issues, but given that the power has already been granted, the Administration is now in the position to control the terms of the debate.

IV. Management Flexibility

Discretion over the Department's personnel was another key arena in which the institutional battle for power was played out. The President successfully pushed for significant "managerial flexibility" over DHS employees.¹⁰⁹ Congressional Democrats believed this flexibility was less a matter of national security than an opportunity for Republicans to undermine federal employee unions and workers' rights.¹¹⁰ The debate over this issue was fierce, leading to several impasses between Congress and the

policing by potential polluters. If the companies implement an EPA policy-formulated system of self monitoring, it is possible for them to avoid fines and criminal penalties in the event of a breach of their permits. *See* 33 U.S.C. §§ 1251-1378 (2003).

¹⁰⁶ *See* Daugherty, *supra* note 100.

¹⁰⁷ *See* Nelson, *supra* note 13, at 162. In the midterm elections of 2002, President Bush utilized his considerable political capital to help several Republicans campaign for House and Senate seats. *Id.* Twelve of the sixteen Senate candidates for whom he campaigned won, as did all but two of the twenty-three House candidates. *Id.* Republicans consequently were able to claim a mandate for the President. *Id.*

¹⁰⁸ *See* Victor, *supra* note 12, at 1066.

¹⁰⁹ *See* Thessin, *supra* note 29, at 530.

¹¹⁰ *See* Nelson, *supra* note 13, at 161.

executive branch during the fall of 2002.¹¹¹ The final provisions in the HSA were hailed as a “compromise,” but the Administration retained many of the key components of the “management flexibility” it had originally requested.¹¹²

Critics of the compromise view the management flexibility provisions of the HSA as violating the National Labor Relations Act of 1947.¹¹³ That Act guarantees workers’ rights to “self-organization, to form, join or assist labor organizations” and to bargain collectively for better working conditions.¹¹⁴ Under the HSA, the President and the Secretary of Homeland Security are given statutory power to modify civil service protections that govern hiring, salary, and workplace decisions.¹¹⁵ Specifically, section 841 of the Act gives the Secretary the flexibility to adjust pay, implement performance evaluation and discipline systems, and to regulate the grievance procedures for Department employees.¹¹⁶ If negotiations between the Department and a union fail after sixty days of negotiations, the Secretary can implement any changes at his discretion.¹¹⁷ Section 842 gives the President the authority to suspend Department employees’ right to organize within unions and engage in collective bargaining if he concludes that these rights would interfere with homeland security.¹¹⁸ Specifically, if the President finds that a union has a “substantial adverse impact” on homeland security, he can “exclude collective bargaining units from the Department” ten days after notifying Congress.¹¹⁹ For congressional Democrats who see themselves as the traditional defenders of labor rights, these were particularly sticky issues.¹²⁰ Consequently, they expended significant energy

¹¹¹ See Joseph C. Zengerle, *The Good News in the Great Debate Over Liberty vs. Security Is This: the White House, the Courts, and Congress Are Inching Toward Common Ground*, LEGAL TIMES, Jan. 20, 2003, at 58.

¹¹² See Leahy Statement, *supra* note 87.

¹¹³ See National Labor Relations Act of 1947, 29 U.S.C. §§ 151-69 (2003).

¹¹⁴ See *id.*

¹¹⁵ Homeland Security Act § 841 (2002).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* § 842.

¹¹⁹ *Id.* § 842(c).

¹²⁰ See Zengerle, *supra* note 111.

combating these provisions as the HSA evolved during the fall.¹²¹

Senator Leahy characterized the Administration's push for "management flexibility" as an abuse of the legislative process. The President, he said, was using the "the new department as the excuse to undermine or repeal laws not liked by [Republican] interests."¹²² Senator Leahy and other Democrats also were concerned that the new management policies might open the way for political patronage.¹²³ The flexibility granted to the Administration over personnel issues in the new department would "authorize political cronyism rather than professionalism within [the DHS]."¹²⁴

The Democrats' unwillingness to budge on what they saw as another erosion of individual rights in the name of homeland security led to a stalemate going into the November midterm elections.¹²⁵ Several commentators believed the stalemate harmed the Democrats.¹²⁶ In Georgia and Missouri, Democratic senators who had been outspoken on the labor issue lost their seats to Republicans who had criticized them for not backing President Bush.¹²⁷ When the lame-duck Congress finally passed the bill, it gave the President most of the "management flexibility" he desired.¹²⁸

In fairness to the Administration, the final version of the HSA does put some limits on the discretion of the President and Secretary, and thus lessens the potential for abuse that the Democrats feared. The Secretary may not abridge government-employee rights to merit-based promotions, whistleblower protections, or veterans' benefits.¹²⁹ Furthermore, the Secretary's power to alter procedures protecting employees' rights to appeal pay and discharge decisions is subject to a sunset provision: under the HSA, this power will expire five years after the transition

¹²¹ See *id.*

¹²² Leahy Statement, *supra* note 87.

¹²³ See *id.*

¹²⁴ *Id.*

¹²⁵ See Zengerle, *supra* note 111.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ See Thessin, *supra* note 29.

period to DHS.¹³⁰ In the meantime, the Administration retains a remarkable degree of control over federal employee management.

The impact of the HSA-granted “management flexibility” on federal workers is significant. As of March 2003, one in every twelve federal workers was on the DHS payroll.¹³¹ DHS employees are working in all fifty states, Washington, D.C., and forty-nine foreign countries.¹³² A significant number of federal employees will be affected by any administrative employment policy. The problem is exacerbated by the fact that, over the next five years, up to fifty percent of the federal labor pool will be eligible for retirement.¹³³ Many critics of increased Executive flexibility are worried that fear of suspension of bargaining rights and civil protections might accelerate retirements, leading to a critical shortage of federal workers.¹³⁴ While the Bush Administration has cited the need for maintaining employee performance and effectiveness¹³⁵ as a key justification for “management flexibility,” it is also likely that the historic power grant could have the opposite effect: it could undermine agency expertise by facilitating a massive exodus of experienced workers.

V. Conclusion

The terrorist attacks of September 11, 2001 gave rise to domestic security and international relations issues that have fundamentally altered the cultural and political landscape in this country. We have responded to the attacks on several fronts: waging war in Afghanistan and Iraq, passing the USA PATRIOT Act, and shoring up domestic security through passage of the Homeland Security Act. The debates over the HSA provide a microcosmic perspective on the constitutional issues that will continue to present themselves in the context of an undefined and perhaps unending war. The institutional power struggle between Congress and the President will be a crucial component on all of

¹³⁰ *See id.*

¹³¹ *See Department of Homeland Security—The First Months*, TRAC REP., Aug. 25, 2003, at <http://trac.syr.edu/tracreports/tracdhs/DHSreport030825.html>.

¹³² *Id.*

¹³³ *See* Thessin, *supra* note 29.

¹³⁴ *Id.*

¹³⁵ *See id.*

these fronts.

President Bush's comparison of the DHS to the government reorganization that took place under the National Security Act of 1947 is appropriate in more ways than one. The most obvious sense is the sheer scale of bureaucratic redefinition that took place under both acts. But the more important comparison is less overt: both acts resulted in significant transfers of power to the presidency. Where the NSA solidified the Executive's power over foreign affairs, the HSA, in the name of homeland security, is increasing the President's discretion and autonomy over domestic matters.

In *The Federalist* No. 51,¹³⁶ James Madison warned of an inherent danger in a constitutional system comprised of separate, coequal branches of government: each branch will have a tendency to draw more power to itself.¹³⁷ But, Madison noted, systems such as ours are designed to check themselves against this tendency:

[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition. . . . It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? . . . If angels were to govern men, neither external nor internal controls on government would be necessary.¹³⁸

In the context of the War on Terrorism being waged on both international and domestic fronts, the dangers inherent in the abdication of one branch's institutional powers are illuminated. If government truly is "the greatest of all reflections of human nature," it only makes sense that the Executive has seized the opportunity presented by the War on Terrorism to shore up its institutional power. It also makes sense that Congress would acquiesce to some degree, given the broad political support for a

¹³⁶ *THE FEDERALIST* NO. 51 (James Madison).

¹³⁷ *Id.*

¹³⁸ *Id.*

wartime president. But the fact remains that Congress is the primary and most effective check on executive power in times of war. In *The Federalist* No. 48, Madison saw fit to remind his contemporaries that “[a]n elective despotism was not the government we fought for.”¹³⁹ Today it is Congress’s duty to check the President’s power, and ensure that such a form of government does not take hold.

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¹³⁹ THE FEDERALIST NO. 48 (James Madison).

